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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-585

JACKSON SAWMILL COMPANY, INC., Et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, Et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

To Memorandum for the Federal Respondents in Opposition

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The Solicitor General's Memorandum for the Federal Respondents in Opposition, containing a total of four pages and two lines of argument, reflects, apparently, the comfortable assumption held by the federal government that this Court will fail to grant Certiorari to Petitioners in this case. As a three-judge panel of the Eighth Circuit Court of Appeals approved the District Court's Motion to Dismiss, the Solicitor General apparently has concluded that there is no need for more than a brief acknowledgment that the case is on the docket. In such fashion the federal government would thus dismiss not only the loss of well over $7,000,000 suffered by several thousand indi-

vidual bondholders because of actions taken by it, but, and in the long term, of far greater importance, the government would by this precedent condone the taking of the rights and property of a few, in the name of the government, to satisfy "the necessity and demands" of the general public.[1]

While this case may thus die aborning, before the full facts may be discovered and before either fault or innocence may be accurately assigned, there is one fact which will remain, and that is that the federal government with full knowledge and intent, took, impaired, and destroyed a property right which was the only protection for a $7,000,000 investment, which investment has now, consequently, been lost. That property right was an exclusive franchise right or, more specifically, a convenant between Petitioners and the City of East St. Louis, ratified by the State of Illinois, *that no competing bridge would be built.* The United States, with full knowledge of this covenant "overruled" the objections of the City of East St. Louis (Petition for Writ of Certiorari, P. 7) and built a competing bridge. Unless this Court grants Petitioners relief, that wrong will go uncorrected. It is to this Court, therefore, that Petitioners direct their final appeal.

One is required to ask, in the face of these actions and the lower Courts' failure to question them whether there exists a flaw, an imperfection in the Constitution and in its intended design for the protection of the individual against an ever increasingly powerful central government. Or, on the other hand, is the Solicitor General's response simply a result of a lack of interest in the rights of a small minority of individual investors so long as the "greater good" is served. Petitioners respectfully urge this Court, as the Court of Last Resort, as the tribunal historically attuned to protecting the right of the individual against whatever power is opposed to him, to give Petitioners a simple chance to pursue their case, to have, at least, their day in Court. To date, Petitioners have been denied even the right to discover the facts that would support or refute their allegations.

[1] As argued in its original brief to the District Court, "the actions taken by these defendants with respect to the construction of the Poplar Street Bridge were justified by necessity and demands of the traveling public which would be paramount to the interests of the few select bondholders". Memorandum in Support of Federal Defendants' United States of America and Honorable William T. Coleman, Secretary of the Department of Transportation, Motion to Dismiss, page 9. Of course, it is noted, this argument could be used at any time to justify *any* governmental action which deprives a private citizen of life, liberty or property. Fortunately, such a concept is not found in the Fifth Amendment.

1. The Solicitor General endorses the statement relied on by the Eighth Circuit to deny Petitioners' claim that the "United States *acquired* no property interest from [petitioners] entitling them to compensation regardless of the label attached to the [petitioners] contract rights with the City" (Memo in Opposition, p. 2).

It has *never* been a requirement that the United States *acquire* a property right in order for a claimant to have been deprived of one. The Fifth Amendment states simply that no person "shall . . . be *deprived* of life, liberty, or property without due process of law;" and it is the deprivation that is proscribed. No acquisition is necessary. The government acquired nothing in the case of *United States v. Causby,* 328 U.S. 256 (1946); nor in *Batten v. United States,* 292 F.2d 144 (10th Cir. 1961). Those cases involved the deprivation of a person's property by the activities of aircraft. Nor was there an acquisition where governmental action resulted in blocked or impeded drainage, *Tri-State Materials Corp. v. U.S.,* 550 F.2d 1 (Ct. Cl. 1977), or where the government's action caused percolating water to rise through the ground and injure plaintiff; *Barnes v. U.S.,* 538 F.2d 865 (Ct. Cl. 1976). As stated by this Court, "[g]overnmental action *short of acquisition* of title or occupancy has been held, if its effects

are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *United States v. General Motors Corp.*, 323 U.S. 373 at 378. That is exactly what happened here. The statement, therefore, relied on by both the Solicitor General and the Eighth Circuit to deny Petitioners' right to a trial is based, apparently, on an erroneous assumption as to what is the law. The law does not require that the United States *acquire* a property interest from Petitioners. That the Petitioners were deprived of their interest would appear to be sufficient.

2. The Solicitor General's second point is that

> "the United States took no action that could be considered a regulation or restriction of that traffic flow. Motorists were as free to use the King Bridge after 1967 as they were before then. Their apparent choice to use it less often has led to the souring of Petitioners' investment. But the Fifth Amendment does not require compensation for 'consequential injuries resulting from the exercise of lawful power' " (Memo in Opposition, pp. 3-4).

Here, of course, the problem is that the governmental action was, it is earnestly prayed by Petitioners, *not* an exercise of lawful power. If the right to have an exclusive franchise right is protected property, and it is, as has been held by this Court in *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51 (1866), then what the government did here was to unlawfully destroy that protected property. For an exclusive franchise is exactly what Petitioners had, *a promise that no new bridge would be built*. Without that promise Petitioners would not be here because they are well aware that, as the District Court, the Eighth Circuit and the Solicitor General have all noted, "there is no property right or vested interest in a continuing flow of traffic." All parties in this case agree on that point. The Petitioners are not claiming and have not claimed a constitutionally protected property right in the flow of traffic. The Petitioners, however, do

claim that their exclusive franchise is a property right deserving of protection under the Fifth Amendment. Without ever addressing either the *Binghamton Bridge* or *Monongahela* decisions (*Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893)), the Eighth Circuit seems to have concluded, as a matter of law, that the Petitioners' alleged exclusive franchise rights do not constitute constitutionally protected property.

Petitioners are respectfully asking this Court to decide whether the federal government has the power to destroy this specific right, *that no new bridge would be built*, when this Court has already ruled that a state government cannot do so. *See, Binghamton Bridge, supra.*

3. The Solicitor General also argues that "whatever Petitioners alleged the United States to have done, it did not 'impair the obligation' of the contract." "The United States was not the obligor on the bond contract . . . Even if the Contract Clause applies to the United States, that Clause plainly does not transform every breach of contract into a constitutional violation" (citing *Allied Structural Steel Co. v. Spannaus*, No. 77-747 U.S. June 28, 1978) (Memo in Opposition, p. 4).

Of course, Petitioners have never claimed that the United States was an obligor on the contract, nor has such a condition ever been a requirement for this Court to find an impairment of contract to exist, as is obvious from the subject matter of the *Allied Structural Steel* case itself. For this reason it is also clear that there is no breach of contract action against the United States, nor have Petitioners attempted to allege one. What Petitioners have alleged, arguing that the Contract Clause prohibitions have been subsumed into the Fifth Amendment (*See Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870); and Hale, *The Supreme Court and the Contract Clause: III.*

57 Harv. L. Rev. 852, 890-891 (1944), cited by this Court in footnote No. 12 of the *Allied Structural Steel* opinion *supra*), is that the federal government has taken action that has impaired, in fact destroyed, the only security that the bondholders had: *the promise that no new bridge would be built.*

The federal government, in the language of *W. B. Worthen Co. v. Kavanaugh,* 295 U.S. 56 (1934), "[w]ith studied indifference to the interests of the mortgagee or to his appropriate protection [has] taken from the mortgage the quality of an acceptable investment for a rational investor." 295 U.S. at 60. Furthermore, the actions of the United States "are seen to be an oppressive and unnecessary destruction of *nearly all the incidents that gave attractiveness and value to collateral security.*" 292 U.S. at 62. Of course, the Petitioners are not claiming that the federal government has violated the Contract Clause. The Petitioners, however, are claiming that the Federal Government has violated the Fifth Amendment and its implied prohibition against federal impairment of contract rights.

In the past, the Constitutional guarantee against impairment of contracts was applied usually to those cases where a specific law was enacted destroying certain specified rights. Here the federal bureaucracy, acting under general laws giving it only general authority to build and finance an interstate highway system, used those general laws to destroy Petitioners' vested contract rights.[2] If the United States Congress had enacted a specific statute in order to destroy the bondholder's property

[2] "The planning of public highways cannot be limited to the enhancement of the investment of a few. Benefits which come and go with changing currents of public travel are not matters in which a few individuals have any vested right *against the judgment of those public officials* whose duty it is to build and maintain highways." (Emphasis added.) Memorandum In Support of Federal Defendants' United States of America and Honorable William T. Coleman, Secretary of the Department of Transportation, Motion To Dismiss, p. 4.

rights, there would be little doubt about whether the Fifth Amendment afforded the Petitioners protection. Why is the situation different when federal bureaucracy accomplishes the same thing with less forthrightness and publicity?

As the decisions of bureaucrats acting under general statutory authority are, in this day of massive government, more likely to be the cause of a deprivation of individual rights than the enactment by Congress of a specific law, Petitioners respectfully suggest that the Fifth Amendment should prevent the interpretation or implementation of a general law by governmental agencies in such manner as to impair the obligation of a contract. Otherwise the Constitution will be powerless to prevent the more insidious harm in this day where governmental excess is more likely to appear in the unpublicized activities of governmental bureaucrats rather than in highly visible legislative chambers.

4. Finally, the Petitioners respectfully submit that if the Eighth Circuit's decision is permitted to stand, the question of whether there has been a taking under the Fifth Amendment may become a question of law. We believe this Court has always approached it as a question of fact. *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

If the question of "taking" is one of fact, then how could the Eighth Circuit, prior to *any* discovery, rule that the federal government "took nothing, directly or indirectly that belonged to the appellants" (Appendix to Petition for Writ, p. 9)?

CONCLUSION

For the foregoing reasons, Petitioners renew their request for Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Service

Fred Leicht, Jr., appearing on behalf of Jackson Sawmill Co., Allen G. Bohmer, Dr. Paul T. Scoggins and Rev. David D. McKee, certifies, as a member of the Bar of the United States Supreme Court, that three copies of this Brief have been sent via first class mail to each of the counsel of record, the Solicitor General of the United States and the Department of Transportation of the United States.

Fred Leicht, Jr.